

## THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970: STATE PLANS AND THE GENERAL DUTY CLAUSE

The Occupational Safety and Health Act of 1970 (OSHA)<sup>1</sup> culminated three years of extensive congressional hearings<sup>2</sup> underscoring the tragic failure of the existing system of state, private<sup>3</sup> and limited federal<sup>4</sup> controls to protect the nation's workers from the hazards of the workplace. 14,000 employees killed annually as a result of industrial accidents, over two million disabled,<sup>5</sup> untold thousands with work-related illnesses<sup>6</sup>—these statis-

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<sup>1</sup> 29 U.S.C. §§ 651-78(1970).

<sup>2</sup> *Hearings on S.2193 and S.2788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st & 2d Sess. (1969-70) [hereinafter cited as 1969-70 Senate Hearings]; *Hearings on S.2864 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 2d Sess. (1968) [hereinafter cited as 1968 Senate Hearings]; *Hearings on H.R. 843, H.R. 3809, H.R. 4294, H.R. 13373 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. (1969) [hereinafter cited as 1969 House Hearings]; *Hearings on H.R. 14816 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong., 2d Sess. (1968) [hereinafter cited as 1968 House Hearings].

<sup>3</sup> Even Secretary Schultz's rather generous assessment of private and state activities in this field suffices to underline their gross inadequacy:

(1) The private sector—In considering the kind of occupational safety and health legislation needed, it is essential to recognize the positive results many American industrial enterprises have made to reduce the number of work-related injuries and diseases. It is largely from these *individual* results that we have learned that the job of making the workplace generally safe *can* be done, *if* we set ourselves to the task. . . . *When* safety is given priority, favorable results ensue.

(2) State efforts—Some States have achieved remarkable results from their endeavors to reduce the number and severity of occupational injuries and illnesses. But efforts of the States, viewed as a whole, have been highly uneven. . . . Some States do not have rulemaking authority. Therefore they lack a legal flexibility which is necessary if law is to keep pace with the needs of occupational safety and health in a dynamic industrial setting. Today many State safety and health standards are out of date and dubiously effective. In some States the number of properly trained personnel to carry out State responsibility for the safety of workers is frequently small. So enforcement is frequently inadequate.

Statement of Hon. George P. Shultz, 1969-70 Senate Hearings 78-79 (emphasis added).

<sup>4</sup> Acting pursuant to statute, the federal government exercised piecemeal authority in this field prior to "OSHA." Among the principal sources of this authority were the: National Foundation of Arts and Humanities Act, 20 U.S.C. §§ 951-63 (1970); Federal Metal and Non-Metallic Mine Safety Act, 30 U.S.C. §§ 721-40 (1970); Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801-4, 811-21, 841-46, 861-78, 901, 902, 921-24, 931-36, 951-60 (1970); Act of August 23, 1958, 33 U.S.C. § 941 (1970); Contract Work Hours and Safety Standards Acts, 40 U.S.C. §§ 327-33 (1970); Walsh-Healey Act, U.S.C. §§ 35-45 (1970); Service Contract Act of 1965, 41 U.S.C. §§ 351-57 (1970); Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 431-41 (1970).

<sup>5</sup> Statement of Hon. George P. Shultz, Secretary of Labor, 1969-70 Senate Hearings 77.

A 1970 study authorized by the Department of Labor and conducted among a sample of businesses in California indicated that this disability figure might actually be 25 million—about ten times as large as the present estimate. 116 CONG. REC. 37628 (1970). As Andrew Biemiller, director of the AFL-CIO Department of Legislation, has pointed out, the use of the Z16.1 standard for reporting occupational injuries produces injury statistics far below their proper magnitude. This standard, said Biemiller, provides a basis for reasonably accurate statistics only where the accident results in death or permanent impairment. Statement of Andrew Biemiller, 1969 House Hearings 631. For further discussion of Z16.1 see Statement of Ralph Nader, 1969-70 Senate Hearings 628-29.

tics alone, alarming as they might seem, only intimate the magnitude of this failure. Testimony by and about individual workers, testimony revealing the many individual tragedies obscured by mere statistics, provided Congress with the more accurate, the more disturbing view.

OSHA conferred on the Secretary of Labor authority to set standards for safe and healthful conditions of employment<sup>7</sup> for essentially every non-public employer in the nation.<sup>8</sup> These standards typically require the maintenance of specified conditions<sup>9</sup> or the use of certain methods of operation or procedure.<sup>10</sup> Each covered employer has the duty of complying with all occupational safety or health standards applicable to his place of employment.<sup>11</sup> In addition, under the Act's general duty clause,<sup>12</sup> the employer has a duty, essentially derived from the common law,<sup>13</sup> to "furnish to each of his employees employment and a place of employment

<sup>6</sup> The United States Public Health Services (part of HEW) estimated that 390,000 workers became victims of occupational disease in 1968, 116 CONG. REC. 38387 (1970). A recent report by the National Center for Health Statistics set at 100,000 the approximate number of deaths each year from occupational illnesses. "Senate to Vote Today on Plan to Cut Job-Injury Protection," N.Y. Times, Oct. 3, 1972, at 15, col. 1 (city ed.). The ratio of disabling injuries per million man-hours climbed from 11.4 in 1958 to 14.0 ten years later. Statement of Hon. George P. Shultz, 1969-70 *Senate Hearings* 77. Similar statistics are lacking for occupational illnesses since there has been little reporting in that sphere. S.REP. NO. 91-1282, 91st Cong. 1st Sess., *U.S. Code Cong. & Ad. News* 5179 (1970). At least qualitatively, however, a substantial increase in the ratio for disabling illnesses is likely, in view of the fact that potentially toxic substances have been continuously introduced into the workplace under the aegis of a presumption of their innocence. Statement of Anthony Mazzochi, 1969 *House Hearings* 1207. A 1969 estimate, now undoubtedly too low, set this influx at 600 new chemicals per year. Moreover, at the time of OSHA's enactment approximately 6,000 chemicals were being used in industry and safe threshold limit values were known for only approximately 500 of them. Statement of Anthony Mazzochi, 1969 *House Hearings* 1181; 116 CONG. REC. 38390-91 (1970).

<sup>7</sup> Occupational Safety and Health Act of 1970 [hereinafter cited as Act] § 6, 29 U.S.C. § 655(1970).

<sup>8</sup> Act § 4, 29 U.S.C. § 653 (1970). Exceptions would include employees regulated by other federal agencies and by state agencies acting pursuant to section 274 of the Atomic Energy Act of 1954.

<sup>9</sup> See, e.g., 29 C.F.R. § 1910.93a(a) (1972):

The 8-hour time-weighted average airborne concentration of asbestos dust to which employees are exposed shall not exceed 5 fibers per milliliter greater than 5 microns in length, as determined by the membrane filter method at 400-450 X magnification (4 millimeter objective) phase contrast illumination. Concentrations above 5 fibers per milliliter but, not to exceed 10 fibers per milliliter, may be permitted up to a total of 15 minutes in an hour for up to 5 hours in an 8-hour day.

<sup>10</sup> See, e.g., 29 C.F.R. § 1910.23(b) (1) (1972):

A mechanical or electrical power control shall be provided on each machine to make it possible for the operator to cut off the power from each machine without leaving his position at the point of operation.

<sup>11</sup> Act § 5(a) (2), 29 U.S.C. § 654(a) (2) (1970).

<sup>12</sup> Act § 5(a) (1), 29 U.S.C. § 654(a) (1) (1970).

<sup>13</sup> Members of both houses emphasized the intent to track the employer's common law duty of providing his employees a reasonably safe place to work with the general duty clause. See 116 CONG. REC. 38383 (1970) (remarks of Congressman Perkins); S. REP. NO. 91-1282, *supra* note 6, at 5186. On the common law rule, see *Mather v. Rillston*, 156 U.S. 391 (1895); *Railroad Company v. Fort*, 84 U.S. 553 (1873); *Staubley v. Power Co.*, 21 App. D.C. 160 (1903); *Holstun & Son v. Embry*, 124 Fla. 554, 169 So. 400 (1936).

which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." These two duties lie at the heart of the Act's operation.

The Secretary of Labor is given authority under the Act to conduct inspections,<sup>14</sup> both as part of routine administrative practice<sup>15</sup> and also in response to specific employee complaints.<sup>16</sup> When the Secretary's compliance team discovers a violation of either a specific standard or the general duty clause, he issues a citation to the employer.<sup>17</sup> If the violation poses an "imminent danger" to employees, the Secretary may also choose the more expeditious route of a court injunction to ensure elimination of the hazard.<sup>18</sup> In any event, soon after issuing the citation, the Secretary notifies the employer of the civil penalty, if any, which he proposes to assess for the violation.<sup>19</sup> Willful or repeated violations are dealt with most severely;<sup>20</sup> failure to abate the hazard within the time specified in the citation subjects the employer to sizable additional penalties.<sup>21</sup> The employer may challenge both the citation and the penalty before the Occupational Safety and Health Review Commission, an independent agency,<sup>22</sup> and appeal an adverse determination by the Commission to the appropriate United States court of appeals.<sup>23</sup>

Congress intended this federal standard-setting, enforcement and adjudicatory scheme to preempt the field of occupational safety and health.<sup>24</sup> The Act, however, permits any state to displace the federal standard-setting authority and to reassume responsibility for the development and enforcement of its own standards by adopting a "state plan" for dealing with occupational safety and health hazards.<sup>25</sup> Both OSHA and the regulations

<sup>14</sup> Another check on employer noncompliance with these duties lies in recordkeeping requirements, Act § 8(c), 29 U.S.C. § 657 (c) (1970); 29 C.F.R. Part 1904 (1972). Knowingly false recordkeeping is met with criminal sanctions, Act § 17(g), 29 U.S.C. § 666(g) (1970), and other failure to comply with recordkeeping regulations may lead to civil penalties, Act § 17 (c), 29 U.S.C. § 666(c) (1970).

<sup>15</sup> Act §§ 8(a), (b), (e), (f) (2), 29 U.S.C. §§ 657(a), (b), (e), (f)(2) (1970).

<sup>16</sup> Act §§ 8(a), (b), (e), (f) (1), 29 U.S.C. §§ 657 (a), (b), (e), (f)(1) (1970).

<sup>17</sup> Act § 9, 29 U.S.C. § 658 (1970).

<sup>18</sup> Act § 13, 29 U.S.C. § 662 (1970). An "imminent danger" is a hazard "which could be expected to cause death or serious physical harm immediately."

<sup>19</sup> Act §§ 10(a), 17, 29 U.S.C. §§ 659(a), 666(1970).

<sup>20</sup> Act §§ 17(a)-(c), (e), 29 U.S.C. §§ 666(a)-(c), (e) (1970).

<sup>21</sup> Act § 17(d), 29 U.S.C. § 666(d) (1970).

<sup>22</sup> Act § 10(c), 29 U.S.C. § 659(c) (1970).

<sup>23</sup> Act §§ 11(a), (b), 29 U.S.C. §§ 660(a), (b) (1970).

<sup>24</sup> A state may, however, assert jurisdiction over any occupational safety or health "issue"—"industrial, occupational or hazard grouping," 29 C.F.R. § 1902.2(c) (1) (1972)—with respect to which no OSHA standard is in effect. Act § 18(a), 29 U.S.C. § 667(a) (1970). "Issue," a complex term, is defined at length in OSHA Administration Program Directive 72-15, found in BNA, 1 Occupational Safety and Health Reporter [hereinafter cited as O.S.H.R.] 1193, 1215-16 (No. 55) (May 18, 1972).

<sup>25</sup> Act § 18(b), 29 U.S.C. § 667(b)(1970). In addition, under section 18(h), 29 U.S.C. § 667(h) (1970), states could enter into an agreement with the Secretary of Labor allowing

promulgated pursuant to it by the Assistant Secretary of Labor for Occupational Safety and Health set forth guidelines for an acceptable state plan.<sup>26</sup> These guidelines require a state plan to establish and enforce specific safety and health standards<sup>27</sup> which "are or will be" at least as effective as the corresponding federal OSHA standards.<sup>28</sup>

However, they do not require a state plan to incorporate a general duty clause.<sup>29</sup> In view of the detail in which the criteria of acceptability for state plans are set forth in the guidelines, this failure to require explicitly a general duty clause "at least as effective" as the federal one can not be dismissed as a mere accident.<sup>30</sup> This omission would seem to indicate that inclusion of a general duty clause in state plans is a matter left to the discretion of the individual states—a conclusion apparently confirmed by the approval of plans already submitted lacking such a clause.<sup>31</sup> Although it may be argued that the states are implicitly required to enforce the *federal* general duty clause, this argument is unpersuasive in view of the OSHA Administration's failure to make reference to the general duty

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them to continue their present safety and health activities until December 28, 1972. After that time they would be displaced by the federal OSHA authorities unless they have obtained approval of their state plan. Ohio, alone among the states, failed to enter into an 18(h) agreement, BNA, 1 O.S.H.R. 765, 768 (No.38) (Jan. 20, 1972), and thus the federal government has been in full command of Ohio's occupational safety and health program since the effective date of the Act.

<sup>26</sup> Act § 18(c), 29 U.S.C. § 667(c) (1970); 29 C.F.R. Part 1902 (1972).

<sup>27</sup> A state plan is operative only with regard to "issues" covered by the plan, 29 C.F.R. § 1902.2(a) (1972). On "issues," see note 24 *supra*.

<sup>28</sup> 29 C.F.R. § 1902.3(c) (1) (1972). The "will be" language is geared to the developmental plan option, 29 C.F.R. § 1902.2(b) (1972). Under this option, a state may receive approval of its occupational safety and health program even though the program does not as yet fully meet the criteria of acceptability. Approval is, instead, contingent upon "satisfactory assurances by the State that it will take the necessary steps to bring the State program into conformity with these criteria within the three-year period immediately following the commencement of the plan's operation." It should be noted that approval of a developmental plan—or, for that matter, a plan meeting the criteria at the time of approval—does not prevent the Secretary from exercising enforcement authority in the state, 29 C.F.R. § 1902.1(c) (1) (1972). Furthermore, the Secretary retains this authority until he determines—no sooner than three years after approval in the case of a "developed" plan and no sooner than one year after completion of the "necessary steps" for a developmental plan—that the state plan is meeting in its operation the criteria of acceptability, 29 C.F.R. § 1902.1(c) (1) (1972).

<sup>29</sup> Although 29 C.F.R. § 1902.4 (c) (2) (vii) (1972) may at first glance appear to require a general duty clause in state plans, a comparison of its language with that of OSHA section 13 makes clear that it pertains to the subject matter of that section, imminent dangers, rather than to the general duty clause.

<sup>30</sup> Indeed, if a general duty clause were required, one would anticipate some explanation of the meaning of "at least as effective" in this context.

<sup>31</sup> Of the eight plans approved thus far, BNA, 2 O.S.H.R. 1177, 1205-6 (No.41) (Mar.15, 1973), only one, New Jersey's, contains a general duty clause, BNA, Occupational Safety and Health Reporter Reference File [hereinafter cited as O.S.H.R.R.F.] 81:5101-19 (1973). Since all eight plans are developmental (see note 28 *supra*) the failure of seven states to include a general duty clause in their plans does not mean that they may not incorporate such a clause in their enabling legislation yet to be enacted. To expedite matters at this early stage, they may simply have decided to avoid any political confrontations on such non-essential matters.

clause in various other contexts.<sup>32</sup> On the assumption, therefore, that each state is free to include or exclude a general duty clause in its plan, the purpose of this study will be to examine whether the states *should* include a general duty clause in their plans and, if it is decided that they should, how broad a duty such a clause should impose on the employer.<sup>33</sup>

## I. FACTORS IN THE DECISION-MAKING PROCESS

### A. *Benefits of the Clause*

The principal argument in favor of states' incorporating a general duty clause in their state plans is that it would give administrators of the plan

<sup>32</sup> For example, according to the regulations for state plans, an acceptable plan "provides for prompt notice to employers and employees when an alleged violation of standards has occurred," 29 C.F.R. § 1902.4(c) (2) (x) (1972), and also "provide effective sanctions against employers who violate State standards and others," 29 C.F.R. § 1902.4(c) (2) (xi) (1972). The federal Act calls for notice to employers and employees (by issuance of a citation) when an alleged violation of standards *or of the general duty clause* has occurred, Act § 9(a), 29 U.S.C. § 658(a) (1970), and establishes penalties for violations of standards, orders or *the general duty clause*, Act §§ 17(a)-(c), 29 U.S.C. §§ 666 (a)-(c) (1970). If the OSHA Administration intended that states enforce the federal general duty clause, its failure to mention general duty violations in the regulations cited above seems incongruous. And, indeed, it appears that the states *are* reading meaning into this silence and the federal government has not, to date, made any effort to dissuade them from doing so. *See, e.g.*, BNA, 2 O.S.H.R. 385, 401 (No. 15) (Sept. 14, 1972) (published report of the confrontation in New York over its plan's failure to contain a general duty clause; remarks of Jack Suarez, International Union of Electrical Workers, and statement of support by the national AFL-CIO).

<sup>33</sup> In purely logical terms, the essentially identical inquiry might be addressed to the federal government—*i.e.*, to a congressional decision whether or not to amend OSHA to require explicitly that the states enforce the federal general duty clause or include a general duty clause "at least as effective" as the federal one in their plans, and whether or not to amend the existing OSHA general duty clause to broaden the duty which states, in enforcing the federal clause or a clause of their creation, will minimally impose on the employer. To pose the issues in this manner, to focus on the actions of the federal government, is, however, to ignore the political realities. Indeed, at present, congressional proponents of the Act can at most hope to keep OSHA in its present form. A recent, narrowly unsuccessful attempt in Congress to perform major—and undoubtedly incapacitating—surgery on the Act (by making it inapplicable to employers with 15 or fewer employees) attests to the present strength of anti-OSHA sentiment in Washington. This exemption would have left one in four American workers unprotected by the Act and, as the history of safety in small as opposed to large places of employment attests, would thus have made defenseless those employees most in need of protection. *See* BNA, 2 O.S.H.R. 113, 117 (No. 5) (July 6, 1972) (remarks of George Taylor, AFL-CIO executive secretary); *id.* 49, 51 (No. 3) (June 22, 1972) (remarks of Congressman Daniels). For a history of this aborted effort, *see id.* 593, 595 (No. 22) (Nov. 2, 1972); *id.* 473, 475 (No. 18) (Oct. 5, 1972).

Another indication of the shift in congressional priorities from protecting workers to protecting the economic well-being of their employers is H.R. 16508, 92d Cong., 2d Sess. (1972). Proposed by Congressman Steiger, co-sponsor of the federal Act, this bill would amend OSHA to allow for consultative visits by OSHA personnel to the workplace with no penalties assessable for violations discovered in the course of the visit unless they should constitute imminent dangers—a category which takes in only a minute percentage of violations. On imminent dangers, *see* note 18 *supra* and accompanying text. Although these visits would not as a matter of law take the place of inspections, they would *in fact* inevitably substitute for inspections to a considerable extent. That is, this diversion of limited federal manpower (the concomitant to limited appropriations for OSHA) must detract from the regular enforcement effort. *See* BNA, 2 O.S.H.R. 473, 475 (No. 18) (Oct. 5, 1972) (remarks of George Taylor, AFL-CIO executive secretary). Though a far less explicit attempt to undercut the Act than the exemption amendment, this proposal demonstrates the same rising trend in Congress to tolerate substantial

explicit authority to deal with hazardous conditions in the workplace that do not constitute violations of any of the specific promulgated standards. The significance of this "substantive" function derives from the unfeasibility—if not impossibility—of promulgating standards to cover all unsafe and unhealthful working conditions. As Congress at least tacitly recognized when it enacted a general duty clause, a standard-setting apparatus alone<sup>34</sup> would not suffice for so comprehensive a task.<sup>35</sup> However, a general duty clause would seem to be ideally suited to fill this inevitable gap in the protection afforded employees' safety and health. Unsafe or unhealthful conditions not in violation of any specific standard could be dealt with, via the general duty clause, on an ad hoc basis<sup>36</sup> as they are discovered by an inspector on routine inspection or as they are brought to light by the complaint of an employee<sup>37</sup> or authorized employee representative.<sup>38</sup>

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inroads into the protection afforded employees in order to minimize for the employer these collateral (for him) costs of doing business.

Thus, any inquiry that even contemplates recommending more than already required under the federal Act to protect employees' safety and health would most profitably be addressed to the states—at least *some* of which promise to be more receptive than Congress to innovation on behalf of the worker. See note 3 *supra*; note 45 *infra*.

<sup>34</sup> Under OSHA, Act § 6, 29 U.S.C. § 655 (1970), the Secretary of Labor is authorized during the first two years of the Act's operation to adopt as an occupational safety or health standard any standard in effect under an existing federal safety or health law and any endorsed by a national consensus organization—"a nationally recognized standards-producing organization" which promulgates standards under "procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption," Act § 3(9), 29 U.S.C. § 652(9) (1970). In addition, the Secretary may, on the basis of information submitted to him and after informal hearing, promulgate an occupational safety or health standard.

<sup>35</sup> Implicit in the following statement, delivered at the Senate OSHA hearings and incorporated in the Senate report, is a recognition of the limitations of specificity, the operative mode of standard-setting:

If national policy finally declares that all employees are entitled to safe and healthful working conditions, then all employers would be obligated to provide a safe and healthful workplace rather than only complying with a set of promulgated standards. The absence of such a general obligation provision would mean the absence of authority to cope with a hazardous condition which is obvious and admitted by all concerned [but] for which no standard has been promulgated.

Statement of Howard Pyle, President, National Safety Council, 1969-70 *Senate Hearings* 565; S. REP. NO. 91-1282, *supra* note 6, at 5186.

<sup>36</sup> Some examples of invocation of the OSHA general duty clause where standards provided no basis for citation can be found at BNA, 2 O.S.H.R. 409, 425 (No. 16) (Sept. 21, 1972) (Secretary of Labor v. Southern Soya Corporation) (exposure to storage tank cave-in); *id.* 241, 250-51 (No. 10) (Aug. 10, 1972) (Secretary of Labor v. Jasper Construction, Inc.) (inadequate guarding of hole); *id.* 209, 229 (No. 9) (Aug. 3, 1972) (Secretary of Labor v. REA Express, Inc. & FEC, Inc.) (damp floor in proximity to high voltage); *id.* 137, 145-46 (No. 6) (July 13, 1972) (Secretary of Labor v. Arizona Public Service Company) (unsafe route to worksite). (All the above citations were issued after the specific standards had gone into effect; there had been a lag, during which only the general duty clause provided a basis for citation. See note 88 *infra*.)

<sup>37</sup> Act § 8(f)(1), 29 U.S.C. § 657(f)(1) (1970), provides for special inspections in which the Secretary, on the basis of a written complaint submitted by an employee or the employee's authorized representative (see note 38 *infra*) determines that there are reasonable grounds to believe "that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists." The regulations, specifically 29 C.F.R. § 1903.11(a) (1972), speak in general terms of a special inspection where there is "a violation of this Act."

A general duty clause also performs a secondary, or "supportive,"<sup>39</sup> function that commends its inclusion in state plans. It performs this supportive function in two ways. First, the general duty clause, seen as a safety and health policy statement,<sup>40</sup> signals to the employer the degree of seriousness with which the plan will be enforced and its objectives sought to be achieved. Secondly, the clause provides a touchstone for a court construing other sections of the plan.

The first of these two supportive subfunctions is important in terms of a general deterrence<sup>41</sup> impact on an employer's compliance with his state OSHA duties. On this theory, the broader the employer's general duty to provide safe and healthful employment, the more real the possibility of citations and penalties for a violation of the plan is made to appear to him and, hence, the greater the likelihood of his complying with the plan without a specific directive to him by the enforcement authorities to do so. Not to incorporate a general duty clause in a state plan would, however, not simply mean forsaking a potentially significant deterrent device. It might also mean undercutting other deterrent forces. That is, since the general duty clause is one of the few provisions in the federal Act not required in state plans,<sup>42</sup> a failure to incorporate a general duty clause in the plan might well be taken by employers as a signal of lax

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The crucial difference is that the Act, at least on its face, purports to exclude the possibility of a special inspection for a general duty violation unless it meets the section 13 criteria for an imminent danger, whereas the broad language of the regulations would embrace special inspections for alleged general duty violations regardless of their satisfaction of these criteria.

<sup>38</sup> "Authorized employee representative" means a labor organization certified by the NLRB or in a collective bargaining relationship with the employer, or a person designated by his fellow employees to represent them in proceedings before the Review Commission or its examiners, 29 C.F.R. § 2200.1(f) (1972).

<sup>39</sup> Professor Wellington employs this term in H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* 55 (1968): "A legal duty to bargain may be seen as *supportive of the statutory structure* that assists employees wishing to collectivize their employment relationship." (Emphasis added).

<sup>40</sup> According to the chairman of the Occupational Safety and Health Review Commission (see text accompanying note 22 *supra*) "the Act imposes a general duty on employers which some observers regard as the cardinal standard." Moran, *A Critique of the Occupational Safety and Health Act of 1970*, 67 NW. U.L.REV. 200, 204 (1972).

<sup>41</sup> As used in this note, "general deterrence" is intended to draw its basic meaning from its employment in the literature of criminal law. See, e.g., H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 128-29, 208 (1968); Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U.P.A.L.REV. 378, 386 (1952). No nexus is intended with Professor Calabresi's market-theory use of "general deterrence" in G. CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

<sup>42</sup> The "walk-around" provision is another, Act § 8(e), 29 U.S.C. § 657(e) (1970). Under this provision, the employer must allow the authorized employee representative (see note 38 *supra*) to accompany an OSHA inspector touring the workplace. (The employer need not, however, pay an employee for the time consumed in the walk-around. BNA, 1 O.S.H.R. 933, 935 (No. 45) (Mar. 9, 1972) (decision of Assistant Secretary of Labor Guenther). 29 C.F.R. § 1902.4 (c) (2) (ii) (1972), the relevant "index of effectiveness," is phrased in a manner suggesting that a duplication of § 8(e) would be only one of various possible means of assuring employees the opportunity to bring possible violations of the plan to the attention of the inspection force. An assessment by Secretary Guenther questioning the possibility of an acceptable state substitute for the walk-around, BNA, 1 O.S.H.R. 1137, 1140 (No. 53) (May 4,

enforcement to follow. Thus encouraged, employers would be more likely to maintain conditions violating specific standards until, if ever, specifically ordered to abate them. True, the actual enforcement record under the plan—the frequency of inspections and the agency's policies in issuing citations and calculating penalties for violations discovered—should *in the long run* be a far more significant influence on employer behavior. In the early years of the plan, however, the language of the clause itself may be expected to assume an important position among deterrent forces.

The importance of this subfunction is thus in promoting voluntary compliance.<sup>43</sup> The great significance of voluntary compliance derives from cost considerations. As the federal inspection record under OSHA would seem to indicate,<sup>44</sup> the size of state inspection forces needed to enforce compliance without voluntary efforts would be fantastic.<sup>45</sup> The limitations inevitably imposed on enforcement activity by cost considerations thus ensure that abundant opportunities for "successful" noncompliance will remain—particularly in non-union shops, where the likelihood of employee complaints to the enforcement authorities is very small—and thereby places a premium on voluntary compliance.

The second supportive subfunction involves judicial construction of the plan. Basically, the greater the scope of the duty established by the general duty clause, an ostensible encapsulation of legislative intent, the more likely a court will be to construe other parts of the plan in keeping with a state policy of maximizing safety and health in the workplace. Further, not to include a general duty clause in the state plan amounts to more than simply rejecting a deterrent to judicial dilution of the plan: It creates an omission that might appear as eloquent to a court as to an employer of a relatively low state priority for occupational safety and health. Extracting such a policy statement from the omission, the court might then read the plan itself accordingly.

### B. *Potential Drawbacks of the Clause*

In evaluating the desirability of including a general duty clause in

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1972), may have settled in the affirmative the issues of the need to include such a provision in state plans.

<sup>43</sup> OSHA section 2(b), 29 U.S.C. § 651 (1970), recites various means by which Congress will seek to realize the objectives of the Act. First on the list is voluntary compliance.

<sup>44</sup> In the Act's first six months, the OSHA enforcement team of 300 inspected only 9300 establishments, a rate at which it would take 170 years to inspect the four million workplaces covered by the Act. BNA, 1 O.S.H.R. 1193, 1203 (No. 55) (May 18, 1972); *id.* 693, 695 (No. 35) (Dec. 30, 1971). Although this inspection rate approximately doubled in the second six months, 2 *id.* 241, 243 (No. 10) (Aug. 10, 1972), the possibility of annual inspection of these four million workplaces is made hardly more likely.

<sup>45</sup> This consideration assumes even greater importance in light of the miniscule size of most state forces. At the time of OSHA's enactment there were approximately 1600 state safety inspectors. Three states had over 100 each, half of the states had less than 25, 16 had less than a dozen, and four had none, 116 CONG. REC. 38386 (1970). For statistics on the individual states see 1969 *House Hearings* 666.



its plan, a state should also be aware that the clause presents certain dangers. First of all, a general duty clause, with its inherent vagueness, may invite arbitrary enforcement. Inconsistent application of the clause, both in penalizing employers for alleged violations and in ordering them to bear the costs of eliminating cited conditions would be obnoxious to the legislative ideal of "equal justice under law."<sup>46</sup>

Vagueness in the general duty clause would also give rise to principled legislative opposition in so far as it threatened to deprive the employer of the opportunity to avoid conduct for which he would be penalized. The legislators' basic sense of justice would be violated by a law that failed to give such "fair warning."

In addition, a legislator might question the allocation of society's resources effected by adoption of a general duty clause. He or she might conclude that a general duty clause would exact too high a price for the benefits it might be expected to yield. In particular, since standard-setting remains an available alternative route to safer and healthier workplaces, a legislator might decide that the more precise tool of specific standards would yield similar benefits at a lower cost to the system.<sup>47</sup>

Finally, the state may, in making this cost-benefit balance, decide not to include a general duty clause in its plan because to do so might seriously undermine voluntary compliance with the plan. Since voluntary compliance is a function of *both* the efficacy of deterrent forces and employer good will, the voluntary compliance promised by deterrent forces (including the general deterrence impact of having a general duty clause) may be offset in large part by the alienation of employer good will. If an employer feels that a general duty clause is unfair to him, he may become less reasonable himself and tend more to await a specific directive to correct a hazardous condition before doing so.<sup>48</sup>

This hostility factor arises from the same issues that might trouble the disinterested legislator. Thus, an employer faced with a clause conducive to arbitrary enforcement would tend to regard that clause and the

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<sup>46</sup> See K.C. DAVIS, *DISCRETIONARY JUSTICE* 169-70 (1969).

<sup>47</sup> For a more extensive discussion of costs, see text accompanying notes 94-97 *infra*.

<sup>48</sup> During the OSHA floor debates, various members of Congress emphasized the significance of employer good will. As one Congressman argued:

If legislation in this area is to be genuinely effective in promoting safe and healthful working conditions, it must be rooted in the clear recognition that its success will ultimately depend upon the cooperation and good will of employers regarding the complex problems of job safety and health. Unfair methods will only serve to alienate employers from officials—both state and federal—who ought to be guiding employers toward compliance.

116 CONG. REC. 38379-80 (1970) (remarks of Congressman Scherle). Some provisions in the federal Act rather clearly evince Congress's concern with maintaining employer good will—e.g., the admonition in section 8(d), 29 U.S.C. § 657(d) (1970), to federal OSHA and state agency personnel to minimize an employer's recordkeeping burden, and the proffer in section 28, Small Business Act § 7(b) (6), 15 U.S.C. § 636(b) (6) (1970), of loans to small businesses unable to bear the economic burden of compliance with OSHA duties.

plan of which it is a part as a threat to his existence. However harshly he is going to be treated, he at least wants the assurance that his competitors will be treated just as harshly.<sup>49</sup> Similarly, like the legislator, the employer would react unfavorably to a clause so vague as to fail to give fair warning of punishable conduct. Good faith efforts to comply with this formless general duty could conceivably go for naught. In one swoop, the inspector could crystallize a single aspect of this unparticularized duty for the employer and penalize him for his lack of prescience. Finally, the employer might feel that the cost of a general duty clause outweighs its benefits. In general, the more the cost-benefit balance struck for the employer by the clause deviates from that which he would make himself, the greater his hostility. Moreover, on the most basic level, an employer will almost inevitably resent *any* general duty clause because it further (in addition to the specific standards) deprives him of the freedom to strike the cost-benefit balance himself.

Although these problems can be serious, they may be minimized, as Congress apparently recognized, by a carefully-worded, relatively unexpansive clause. Thus, arbitrary enforcement, always a legitimate concern, is not a significant threat with a fairly well-defined employer duty. The essentially before-the-fact common law duty established by the OSHA general duty clause<sup>50</sup> is exemplary in this regard. Similarly, the OSHA clause, embodying a duty basically identical to the familiar negligence standard, manifests the possibility of giving fair warning of prohibited conduct penalized upon discovery<sup>51</sup> with a clause inevitably partaking of some vagueness.<sup>52</sup>

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<sup>49</sup> And for good reason: If his competitors can keep using a cheaper process which a general duty citation prevents him from employing, his financial demise may indeed be the result.

<sup>50</sup> See text accompanying note 13 *supra*.

<sup>51</sup> The Williams bill passed by the Senate limited the possibility of penalties for a general duty violation to a failure to correct a cited violation within the abatement period. This construction is firmly established in S. REP. NO. 91-1282, *supra* note 6, at 5186. The issue of penalties for an initial general duty violation was discussed at some length during the House debates, and the Steiger substitute (for the Daniels committee bill) passed by the House provided for such initial penalties, 116 CONG. REC. 38399 (1970). Strangely, although the Senate-House conference committee adopted the House approach, no mention of the two houses' divergence on this issue was made in the committee report, 116 CONG. REC. 41977 (1970).

<sup>52</sup> Among the numerous contentions of unconstitutionality made by one employer before a U.S. district court was that the general duty clause is void for vagueness, BNA, 1 O.S.H.R. 717, 721 (No. 36) (Jan. 6, 1972). The court dismissed the suit for failure to exhaust administrative remedies, *Lance Roofing Company, Inc. v. Secretary of Labor*, Civil Action No. 16012 (N.D.Ga., May 23, 1972), *aff'd mem.*, 93 S. Ct. 679 (1972). See BNA, 1 O.S.H.R. 1249, 1251 (No. 57) (June 1, 1972). Prior to its dismissal, George C. Guenther, Assistant Secretary of Labor for Occupational Safety and Health characterized the case in general as one of little merit. *Id.* 933, 946 (No. 45) (Mar. 9, 1972). At least with regard to the void for vagueness point, he is almost certainly right. First of all, the doctrine is virtually never applied unless criminal punishment may attach for noncompliance, Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA.L.REV. 67 (1960). But violations of the general duty clause are met with "civil" penalties, Act § 17(b), 29 U.S.C. § 666(b) (1970). Secondly,

As to the cost-benefit problem, the precedent of congressional enactment of the OSHA clause suggests that a decision-maker with similar priorities would feel that the benefit to employees of having a clause would outweigh its costs to employers and consumers (who would share the cost if some employers could pass along their costs in the price of their products). Indeed, a legislature, in calculating the benefits promised by a clause as precisely formulated and limited in scope as the OSHA clause, would not have to discount significantly for employer hostility. Precise formulation would dampen hostility on grounds of arbitrary enforcement and unfair surprise. Moreover, since the scope of the OSHA duty is essentially no greater than the common law duty, the employer could hardly regard as unreasonable the cost-benefit balance struck for him by such a clause. It obligates him to do no more now than he should have been ready to do previously. Although this does deprive him of the choice whether or not to invest in a certain amount of safety, its moderate demands on him would not be expected to trigger sufficient hostility to offset significantly the voluntary compliance generated by deterrent forces.

Of course, the penalty structure<sup>53</sup> ensures that the employer will not

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assuming that this civil penalty can be assimilated to a criminal punishment (*i.e.*, a fine), this clause which essentially tracks the centuries-old common law doctrine of employer negligence (see note 13 *supra*) must be characterized as unconstitutionally vague. Some vagueness undeniably inheres in a negligence standard, but—in view of both the great deal of case law on employer negligence and the need to determine negligence as an element of numerous offenses—it is dubious that this vagueness takes on constitutional dimensions. Finally, in the unlikely event that the general duty clause should be adjudged unconstitutional on this basis, the infirmity could be corrected by limiting general duty clause penalties to violations of a reasonable abatement order (based on the clause) directed specifically at the violating employer and the violating conduct. *Cf.* Longshoremen's and Harbor Workers' Compensation Act §§ 41(a), (f), 33 U.S.C. §§ 941(a), (f) (1970).

<sup>53</sup> "Any employer . . . shall be assessed a civil penalty of up to \$1,000 for each such violation," Act § 17(b), 29 U.S.C. § 666(b) (1970) (emphasis added).

Although sections 17(a)-(c) are all applicable to general duty violations, section 17(b) will almost always be the provision invoked. Section 17(a) prescribes civil penalties for willful or repeated violations of the general duty clause. To show a willful violation of this *unparticularized* duty, the inspector must carry the heavy burden of proving:

- (1) that the employer committed an intentional and knowing violation of the Act and the employer is conscious of the fact that what he is doing constitutes a violation of the Act, or (2) even though the employer was not consciously violating the Act, he was aware that a hazardous condition existed and made no reasonable effort to eliminate the condition.

BNA, O.S.H.R.R.F. 77:3106 (1971). A repeated violation of the clause—the recurrence of a condition previously cited as a general duty violation, *id.* 77:3107 (1971)—would also be rare. The DOL has emphasized that citation for either a willful or repeated violation (of the general duty clause or a specific standard) "will frequently raise difficult issues of law and policy," *id.* 77:3107 (1971), and may only be issued after approval by the National Office.

Section 17(b) establishes penalties for "serious violations" of the clause and section 17(c), for violations determined not to be "serious." The definition of "serious violations" (see note 85 *infra*) essentially embraces all general duty violations (willful or repeated violations included). First of all, both serious violations and general duty violations deal with hazards entailing a substantial probability of serious physical harm. Secondly, the limitation of "serious violations" to hazards discoverable with the exercise of reasonable diligence does not appear to exclude any "recognized hazards"—indeed, it would seem to subsume this category

be as happy with a general duty clause as he would be with simply a common law duty. For, though the duty may be no broader than that existing under common law, the liabilities for its breach are.<sup>54</sup> Nevertheless, as long as the magnitude of the penalties is reasonable,<sup>55</sup> their occasional assessment should not seriously alienate employer good will.

On the one hand, a general duty clause equal in scope to that in OSHA promises to perform substantive and supportive functions of great significance in ensuring every working man and woman a safe and healthful place to work. On the other hand, such a clause does not present any serious problems of arbitrary enforcement, unfair surprise or employer hostility. In sum, any state performing the cost-benefit balance with similar priority for occupational safety and health today as Congress had in 1970

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of hazards, *see* text accompanying note 80 *infra*. Nonserious general duty violations are thus a basically nonexistent category. (The DOL may be implicitly conceding this when it instructs its inspectors only to issue citations for serious, willful or repeated general duty violations, BNA, O.S.H.R.R.F. 77:3102 (1971).)

<sup>54</sup> As one congressman rightly observed, an employer would be liable for a breach of his common law duty only when such breach proximately caused an injury and no adequate defense could be raised; however, he is liable for a breach of his OSHA general duty absent any harmful consequences and without regard to the traditional defenses. 116 CONG. REC. 38371 (1970) (remarks of Congressman Steiger). "Final responsibility for compliance with the requirements of this act remains with the employer," S. REP. NO. 91-1282, *supra* note 6, at 5187. Thus, the Review Commission and its examiners have affirmed citations and penalties for violations produced by an employee's apparent negligence. *See, e.g.*, Secretary of Labor v. Lebanon Lumber Co., BNA, 2 O.S.H.R. 137, 144 (No. 6) (July 13, 1972) (examiner's decision), *aff'd*, BNA, 1 Occupational Safety and Health Reporter Decisions [hereinafter cited as O.S.H.R.D.] 1165 (1973) (Review Commission); Secretary of Labor v. Cam Industries, Inc., BNA, 2 O.S.H.R. 17, 24 (No. 2) (June 15, 1972) (examiner's decision); Secretary of Labor v. Norman R. Bratcher Company, 1 *id.* 909, 915-16 (No. 44) (Mar. 2, 1972) (examiner's decision), *rev'd on other grounds*, BNA, 1 O.S.H.R.D. 1152 (1973) (Review Commission). Many employers have reacted to this penalization for an employee-created violation by demanding OSHA penalties applicable to employees. (At present, OSHA establishes only an employee duty, Act § 5(b), 29 U.S.C. § 654(b) (1970), but no sanctions for noncompliance.) Many proponents of the Act have questioned the wisdom of such an intrusion into the traditional employer-employee relationship, under which the employer is free to discipline the employee for unsafe behavior. *See* BNA, 1 O.S.H.R. 1089, 1091 (No. 51) (Apr. 20, 1972) (remarks of Assistant Secretary Guenther); *id.* 1065, 1068 (No. 50) (Apr. 13, 1972) (remarks of Congressman Steiger). In addition, Chain Robbins, Deputy Assistant Secretary of Labor for Occupational Safety and Health, has indicated that state plans incorporating such a sanctions provision are likely to be rejected. *Id.* 1065, 1068 (No. 50) (Apr. 13, 1972). In a later official statement, however, Mr. Robbins has qualified this assertion. In OSHA Administration Program Directive 72-19, he makes clear that there is no absolute bar against employee sanctions in state plans. Nevertheless, "[any] State which includes such sanctions must show how these sanctions would not reduce the overall effectiveness of the State's enforcement program below that of the Federal enforcement program." Robbins lists five potential adverse effects (of instituting employee sanctions) that a state must show will be avoided or else suffer rejection of its plan, BNA, 2 O.S.H.R. 297, 321 (No. 12) (Aug. 24, 1972).

<sup>55</sup> From the employer's perspective, the magnitude of OSHA penalties assessed would seem to be unassailably reasonable. The penalties assessed have generally fallen *far* short of the statutory maximum, \$10,000 in the case of willful or repeated violations of specific standards or the general duty clause and \$1,000 for serious and nonserious violations of either sort, Act §§ 17(a)-(c), 29 U.S.C. §§ 666(a)-(c) (1970). During fiscal year 1972, \$2,291,000 in proposed penalties were assessed for 102,860 alleged violation of specific standards or the general duty clause—approximately \$20 per violation, BNA, 2 O.S.H.R. 385, 387 (No. 15) (Sept. 14, 1972).

will do no less than Congress did when it enacted the OSHA general duty clause.

## II. SELECTING AN APPROPRIATE CLAUSE

### A. *A Closer Look at the OSHA General Duty Clause*

Once the decision is made to include a general duty clause in state plans, an obvious prototype is the OSHA general duty clause. The desirability of simply following precedent, however, is by no means clear.

In full, the clause provides:

Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.<sup>56</sup>

In terms of the clause's substantive function, this authorizes the administrators of the Act to issue citations and assess penalties<sup>57</sup> to prompt the correction of conditions: (I) that a reasonably prudent employer in the industry would (A) detect *and* (B) recognize as hazardous; *and* (II) that *have* resulted or, should they cause an accident or illness, more likely than not *will* result in the permanent or prolonged bodily impairment of one or more employees.

This construction of the clause flows principally from the definitions given "recognized hazards" and "serious physical harm" by the Department of Labor (DOL): a "recognized hazard" is a condition that a reasonably prudent employer would detect and recognize as hazardous;<sup>58</sup> and "serious physical harm" is permanent or prolonged bodily impairment.<sup>59</sup> In addi-

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<sup>56</sup> Act § 5(a)(1), 29 U.S.C. § 654(a)(1)(1970).

<sup>57</sup> The OSHA practice thus far has been to limit the inspector, except in rare circumstances, to *recommending* the issuance of citations, the length of the abatement period and the magnitude of proposed penalties, BNA, O.S.H.R.R.F. 77:2521-23 (1971). His immediate superior, the Area Director (above whom there is a Regional Director and then the National Office, *id.* 77:2101 (1971)), makes the final decisions. The inspector does, however, exercise an almost decisive influence. Scrutiny of every recommendation (in addition to numerous administrative duties, *id.* 77:2103-7 (1971)) would impose an impossible burden on the Area Director. Accordingly, he must, except in instances of obvious error, defer to the inspector's first-hand knowledge and judgment. The inspector thus not only invokes but, indeed, largely controls the enforcement process. He decides whether a violation exists and, if it does, effectively governs its disposition (unless successfully challenged before the Review Commission or the courts).

<sup>58</sup> According to the DOL:

A hazard is "recognized" if it is a condition that is (a) of common knowledge or general recognition in the particular industry in which it occurs and (b) detectable (1) by means of the senses (sight, smell, touch, and hearing), or (2) is of such wide, general recognition as a hazard in the industry that even if it is not detectable by means of the senses, there are generally known and accepted tests for its existence which should make its presence known to the employer.

BNA, O.S.H.R.R.F. 77:3102 (1971).

<sup>59</sup> According to the DOL:

Serious physical harm is that type of harm that would cause permanent or prolonged

tion, the language "recognized hazards that are . . . likely to cause death or serious physical harm" contains two causal links that need to be separated: (1) a hazard causes an accident or illness, and (2) an accident or illness causes death or serious physical harm. Thus, the DOL translates "likely" into this framework as follows: A hazard is likely to cause death or serious physical harm if the hazard may cause an accident or illness and such accident or illness will more likely than not<sup>60</sup> cause death or serious physical harm.<sup>61</sup>

These terms, "recognized hazards" and "serious physical harm," and the probability formula "likely to cause" give rise to a substantively inadequate general duty clause. Since the employer has no duty to abate conditions not commonly recognized in the industry as hazards, the inspector is powerless to protect employees from this "unacknowledged" (for OSHA purposes), but not necessarily unmenacing, class of hazards. Industry's failure to take cognizance of asbestosis (severe lung scarring produced by work with asbestos) despite documented medical evidence of its existence attests to the wondrous powers of nonrecognition which employers can exercise.<sup>62</sup> The practice of "state-hunting," seeking out the state with the most permissive safety and health laws, also indicates a readiness on the part of many companies to assume a posture of ignorance.<sup>63</sup> This self-

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impairment of the body in that (1) a part of the body would be permanently removed . . . or rendered functionally useless or substantially reduced in efficiency on or off the job . . . or (2) a part of an internal bodily system would be inhibited in its normal performance to such a degree as to shorten life or cause reduction in physical or mental efficiency . . . On the other hand, breaks, cuts, bruises, concussions or similar injuries would not fit into either of these categories and would not constitute serious physical harm.

BNA, O.S.H.R.R.F. 77:3105 (1971).

<sup>60</sup> The DOL instructs its inspectors that "[a] hazard is causing or is *likely* to cause serious physical harm if it is causing or would *more likely than not* cause serious physical harm," BNA, O.S.H.R.R.F. 77:3102 (1971) (emphasis added). This equation of "likely" with "more likely than not" is redundant and seems, unlike the definitions of "recognized hazards" and "serious physical harm," to be done for the purpose of eliminating *incorrect* alternative meanings rather than of specifying one of various correct meanings. The fact of definition does not, then, indicate that "likely" lends itself to re-construction. Cf. text accompanying note 69 *infra*.

<sup>61</sup> BNA, O.S.H.R.R.F. 77:3104 (1971). (Although this statement is made in the context of a discussion of "serious violations," it is applicable to the general duty clause as well.)

<sup>62</sup> According to one of the leading authorities in the field:

In 1924, almost 50 years ago, Dr. Cooke, in England, described a case of severe lung scarring in a woman who had spent 20 years weaving asbestos into cloth. He termed this new type of lung scarring which had not been previously described asbestosis. Our own Public Health Service in 1934 investigated the asbestos textile industries in this country and found many cases of severe lung scarring. They urged in their report, which was published in 1938, that appropriate precautions be taken and that urgent measures were necessary to eliminate these hazardous exposures.

I will repeat that in the thirties, 40 years ago, we understood well, we had definitive information, we had documented well, the severe risk of asbestosis.

It is depressing to report, then, in 1970, that the disease that we knew well 40 years ago is still with us just as if nothing was ever known.

Statement of Dr. Irving J. Selikoff, Professor of Medicine and Professor of Environmental Medicine, Mt. Sinai School of Medicine, 1969-70 *Senate Hearings* 1073.

<sup>63</sup> The state-hunting done by companies making textile dyes is typical. Although Penn-

serving refusal to know—or, viewed more indulgently, to investigate—can obviously find numerous objects in the area of chemical substances alone worthy of nonconsideration.<sup>64</sup>

Hazardous conditions not discoverable by the reasonably investigative employer—*i.e.*, reasonably investigative for an employer in the particular industry—are also shielded from abatement orders. One such “undetectable” hazard would be airborne contaminants detectable only with highly sensitive monitoring devices. Whatever danger this hazard might pose to employees’ health would be immune from citation.<sup>65</sup>

In addition, the OSHA clause generates a class of “harmless” hazards, hazards not having the potential to cause permanent or prolonged bodily impairment. These, too, are outside the realm of both the employer’s general duty and the inspector’s enforcement authority. Failure to place a guardrail along a platform only three feet high would, then, not be citable, since harm more serious than a broken arm or leg would virtually never follow from a fall.

Also beyond the scope of the general duty clause is a class of hazards too “improbably harmful”<sup>66</sup> for OSHA purposes—those which result in accidents or illnesses having a 50-50 chance or less of causing death or serious physical harm. This group of hazards would include, for example, the absence of a guard on a machine press, where a *possible* result of an accident would be loss of a finger (serious physical harm) but the *likely* result would be a laceration.<sup>67</sup>

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sylvania has prohibited the production of betanaphthylamine (a chemical needed in the dye) on the basis of indications that it causes bladder cancer to workers, Georgia does not—or, at least, did not as of 1970—regulate the chemical at all. As a result, companies simply sought the facilitative confines of Georgia. Statement of Ralph Nader, 1969-70 *Senate Hearings* 627.

<sup>64</sup> Actually, the inspector’s impotence in dealing with “unacknowledged” hazards is not total. He can seek to enjoin the employer to correct the hazard. To be successful in this endeavor, the inspector must convince the federal district court that an “imminent danger” exists in the workplace—*i.e.*, a hazard “which could reasonably be expected to cause death or serious physical harm *immediately*,” Act § 13(a), 29 U.S.C. § 662(a) (1970) (emphasis added). Many “unacknowledged” hazards might fall—or, at least, be adjudged to fall—outside this narrow range of hazards protected by imminent danger procedures. According to the DOL:

Normally, a health hazard (as contrasted with a traumatic injury or death) would not constitute an imminent danger, except in *extreme* situations, such as the presence of high concentrations of airborne substances which are an immediate threat to the lives or health of employees.

BNA, O.S.H.R.R.F. 77:3301 (emphasis in the original). Thus, an imminent danger order would not be available to restrain the use of a chemical substance which would not manifest its carcinogenic effects for years.

<sup>65</sup> Thus, another undoubtedly well-populated class of hazards is subject to immediate controls only through the imminent danger procedures.

<sup>66</sup> These two classes, “harmless” and “improbably harmful” hazards, obviously overlap. In fact, no two of the four classes of hazards described above are mutually exclusive. Therefore, a given hazard not subject to citation as an OSHA general duty violation may fall into one, two, three or all four of these categories.

<sup>67</sup> In the case of both “harmless” and “improbably harmful” hazards, the only protection that the inspector could offer would have to come through the Act’s emergency standard-setting mechanism, Act § 6(c), 29 U.S.C. § 655(c) (1970). Essentially, a specific duty would

In addition to these substantive failings, the OSHA clause is of questionable supportive value. The clause conveys to employers and courts alike an impression of seriousness in enforcement and dedication to purposes that is ambiguous at best. The mere fact of codification of this general duty indicates at least some intent to secure widespread conformity with this and other norms established by the Act. Reinforcement of this duty with enforcement machinery and a penalty structure adds weight to this indication of intent. But the limitations placed on the scope of the employer's duty, the careful qualification of the duty to provide a safe and healthful workplace, seems inconsistent with the stated congressional intent to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions."<sup>68</sup> This circumscription of the general duty in the context of a very ambitious policy statement undercuts the general deterrence effect of both the *codified* clause and Act.

Even apart from this backdrop of the policy statement, the clause itself seems to offer reassurance to employers that enforcement will prove far less than oppressive. Congress has agreed to a general duty clause so limited in scope as to leave employees without protection against innumerable highly dangerous hazards. Requiring *far* less protection than the interests of safety and health would require constitutes a tacit promise of sorts not to push too hard on employers, not to be too rigorous about this whole business of occupational safety and health. The employer probably would not feel that he could always afford to let hazards, whatever their seriousness, languish until an inspector found them, but, on the other hand, he probably would not feel the need to "err" a little on the side of safety. The clause's impact on judicial construction would be similar. Faced with this clause, a court would probably not feel that it had been given an implicit mandate to dilute the Act but, on the other hand, it probably would feel little hesitancy in leaning in that direction.

Since this negative assessment of the OSHA general duty clause takes as a given the DOL interpretation of the clause, there remains the possibility that the OSHA clause may prove suitable for state plans if it is simply

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have to be created before the employer could be ordered to abate the "harmless" or "improbably harmful" hazard. Promulgation of emergency standards by the Secretary of Labor is, however, far from an automatic process. The minimum time elapsing between discovery of the hazard and issuance of a citation based upon an emergency standard violation would compare most unfavorably with the time elapsing between discovery of the hazard and issuance of a citation based on a general duty violation.

Emergency rulemaking would be available—and equally unsuitable—for dealing with "unacknowledged" or "undetected" hazards not qualifying as imminent dangers. The need for immediate action is simply not met. Moreover, whether the relief sought be in the form of a temporary restraining order from a judge or an emergency standard from the Secretary, one can hardly be certain of success. If the aim is to afford employees protection against many of the hazards not subject to abatement orders as general duty violations, the imminent danger and rulemaking procedures provide an inadequate solution. These procedures were not intended and are not equipped to meet this demand for broad ad hoc protection, to enhance the specific enforcement potential of the Act.

<sup>68</sup> Act § 2(b), 29 U.S.C. § 651 (1970).



construed differently. The legislative history attests to the potential for re-construction of "recognized hazards."<sup>69</sup> While one opponent of the Senate bill's general duty clause cautioned that "recognized hazards" might be interpreted to mean recognized by an expert,<sup>70</sup> another senator heralded this phrase as expressing "something that can be recognized by all people—not just readily apparent to an expert in that particular field."<sup>71</sup> Although "serious physical harm," another prime candidate for re-construction, lacks a similar legislative history of disparate constructions it, too, may mean—and probably did mean to Congress—a wide range of things.<sup>72</sup> Finally, the DOL's elucidation of "recognized hazards that . . . are likely to cause death or serious physical harm"—*i.e.*, recognized hazards that may cause an accident or illness, which accident or illness more likely than not will cause death or serious physical harm—by no means exhausts the possibilities. Indeed, a far more sensible interpretation would be to translate "likely" into a product of the two causal links rather than a sum. Whether or not a hazard were "likely to cause serious physical harm" would therefore be determined by multiplying the likelihood that a hazard will cause an accident or illness by the likelihood that such accident or illness will result in serious physical harm.<sup>73</sup>

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<sup>69</sup> The closest approximation to the DOL definition was given by Congressman Daniels, who included "recognized hazards" in an amendment which he offered to the bill reported out of committee and sponsored by him (a bill under obviously serious and successful attack by Congressman Steiger at the time):

A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry. In other words, whether or not a hazard is "recognized" is a matter for objective determination; it does not depend on whether the particular employer is aware of it.

116 CONG. REC. 38377 (1970). (The House never considered the Daniels amendment, since it rejected the Daniels bill in toto in favor of the Steiger substitute.)

<sup>70</sup> 116 CONG. REC. 36531 (1970) (remarks of Senator Dominick).

<sup>71</sup> 116 CONG. REC. 36522 (1970) (remarks of Senator Saxbe).

Singularly unhelpful were the comments of the author of the term "recognized hazards" in the Williams bill, the one finally passed by the Senate:

This is a significant improvement over the Administration bill, which requires employers to maintain the workplace free from "readily apparent" hazards. That approach would not cover non-obvious hazards discovered in the course of inspection. It is also better than the corresponding provision in the Daniels [House] bill which embraces all hazards.

S. REP. NO. 91-1282, *supra* note 6, at 5222 (remarks of Senator Javits). Although this establishes what "recognized hazards" does *not* mean, these upper (not "all" hazards) and lower (not simply "obvious" hazards) limits for "recognized hazards" clearly leave much room for play.

<sup>72</sup> For example, one possibility would be to assimilate "serious physical harm" to the Bureau of Labor Statistics reporting standard, a standard which would embrace injuries far less severe than those meeting the DOL definition of "serious physical harm." On the applicable standard, see note 5 *supra*.

<sup>73</sup> In mathematical terms, any product exceeding 0.25, *i.e.*,  $(0.50)^2$ , would meet the "likely" test. More generally, if the first factor were "very" probable and the second "fairly" probable, or vice versa, an inspector could regard the hazard as being "likely" to cause serious physical harm. (By administrative regulations a state would establish standards of relative likelihood for the first probability factor—*e.g.*, one accident or illness per X man-hours means Y%,

Although this flexibility does present the possibility of a more acceptable general duty clause via re-construction, it also presents the very opposite possibility. The clause might well be interpreted more narrowly by state courts and administrators than it has been by the OSHA Administration. This undesirable result might be avoided by specifying the desired construction of these key phrases in the definitions section of the state plan. But these definitions, to be at all reasonable, must be somewhat limited by the terms themselves. Thus, it is difficult to see how the term "recognized hazards" could be construed to embrace a significantly larger range of hazards than it does as presently construed without departing drastically from the common-sense meaning of the words. Indeed, while the term may, as one senator cited above obviously assumed, lend itself to a narrower construction, there seems to be little support for the opposite proposition.

"Serious physical harm" does appear to allow for a considerably broader construction than that given the term by the DOL. Even here, however, there are obvious limitations. A hazard causing only psychological or emotional harm would necessarily be beyond the reach of a clause incorporating a serious *physical* harm standard.

Finally, the suggested re-construction of the probability formula would eliminate various anomalies that flow from the existing interpretation.<sup>74</sup> Yet, the probability threshold required, *i.e.*, "likely," does preclude abatement orders against the innumerable hazards less than likely to cause serious physical harm. Although re-construction of the OSHA general duty clause might improve it considerably, changes in the language of the clause itself appear necessary to utilize the clause to its fullest in promoting occupational safety and health.

### B. *A Spectrum of Alternatives*

As the scope of the employer's duty is expanded, a general duty clause assumes greater substantive and supportive value, but also poses problems of increasing magnitude. Selecting an appropriate general duty clause involves locating a point of optimum returns from these two conflicting tendencies. A list of general duty clauses illustrative—though admittedly not exhaustive—of points on a spectrum of increasingly expansive employer duties provides a basis for this task:

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or remotely or highly, probable.)

The DOL interpretation—a hazard is "likely" to cause serious physical harm if the hazard "may" cause an accident or illness and such accident or illness is "likely" to cause serious physical harm—generates strange results. For example, hazard A causes 100 accidents per year ("may" met), 40 of which result in serious physical harm ("likely" not met): no general duty violation. Hazard B causes 5 accidents per year ("may" met), 4 of which result in serious physical harm ("likely" met): a general duty violation. The product formula suggested would hopefully avoid such incongruities by giving equal weight to both probability factors involved.

<sup>74</sup> See note 73 *supra*.

A. Each employer shall *have a non-delegable duty* to furnish to each of his employees employment and a place of employment which are free from hazards and conditions discoverable with the exercise of reasonable diligence that are causing or are likely to cause death or serious physical harm to his employees.<sup>75</sup>

Alternative A, the least expansive of these clauses, would make modest inroads into three categories of hazards not reached by the OSHA clause. It narrows the class of "undetectable" hazards in two ways: by stipulating "hazards and conditions" instead of "hazards" alone, Alternative A takes in considerations such as working hours and other pressures of employment seemingly outside of "hazards;"<sup>76</sup> and by substituting "discoverable with the exercise of reasonable diligence" for OSHA's "recognized," it creates a more affirmative duty to guard against hazards which a cursory inspection by the employer might fail to uncover. Secondly, by defining "serious physical harm" as essentially anything requiring more than first aid treatment,<sup>77</sup> this alternative would limit the group of "harmless" hazards. Finally, by establishing a product rule for calculating "likely to cause,"<sup>78</sup> it would diminish the number of "improbably harmful" hazards.

<sup>75</sup> Codification of the "non-delegable" nature of this general duty follows an official construction of the federal clause, *Secretary of Labor v. Thorleif Larson and Son, Inc.*, BNA, 1 O.S.H.R. 1249, 1255 (No. 57) (June 1, 1972) (examiner's decision), *aff'd*, BNA, 1 O.S.H.R.D. 1095 (1973) (Review Commission decision). The aim is to preclude a state court or agency from determining otherwise. An "outside employer," one who sends his employees to work at another employer's establishment, BNA, O.S.H.R.R.F. 77:2503 (1971), must, therefore, make it his business to protect his employees from specific and general duty violations in that establishment affecting them—whether this means applying pressure on the primary employer to abate the hazards or withdrawing his employees from the unsafe or unhealthful site.

As an aid to the reader, the phrase or phrases in each alternative which distinguish it from the preceding alternative (or, in the case of Alternative A, from the OSHA general duty clause) are italicized.

<sup>76</sup> In construing "recognized hazard" (see note 58 *supra*) the DOL defines "hazard" in terms of "condition" and then limits the range of hazardous conditions coming within the term "recognized hazard" to those "detectable by means of the senses." This may indicate either (1) that "condition" embraces the non-physical or non-tangible but "hazard" does not, or (2) that "condition" and "hazard" both embrace the non-physical or non-tangible but "recognized hazard" does not. The former appears more likely. Nevertheless, to assure the breadth of coverage intended, the term "conditions" is included in the general duty clause along with "hazards."

<sup>77</sup> The following might be codified immediately below the general duty clause or in the definitions section of the plan:

"Serious physical harm" means work-related injuries and illnesses other than those requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

The suggested definition basically uses the line drawn in the federal Act between recordable and nonrecordable injuries and illnesses to distinguish between serious and nonserious physical harm, Act § 8(c)(2), 29 U.S.C. § 657(c)(2) (1970).

<sup>78</sup> Such a formulation might read:

"Likely to cause" means that the likelihood that a hazard or condition will cause an accident or illness and the likelihood that such accident or illness will cause harm of the nature proscribed together indicate that more likely than not said hazard or condition will cause harm of the nature proscribed.

Although this product rule is admittedly difficult to verbalize with precision, a draftsman's commentary could help ensure that it would be construed in accord with the legislative intent. On the rationale for this product rule, see note 73 *supra*.

B. Each employer shall have a non-delegable duty to furnish to each of his employees *without regard to considerations of economy* employment and a place of employment which are free from hazards and conditions discoverable with the exercise of reasonable diligence that are causing or are likely to cause death or serious physical harm to his employees.

Alternative B, proceeding from the changes made in Alternative A, subjects the category of "unacknowledged" hazards to the enforcement machinery of the plan. By making cost considerations irrelevant to the scope of the duty, this alternative prevents industries from covertly disqualifying (by willful ignorance) hazards costly to eliminate or control from general duty protection.<sup>79</sup>

C. Each employer shall have an *absolute*, non-delegable duty to furnish to each of his employees employment and a place of employment which are free from hazards and conditions that are causing or are likely to cause death or serious physical harm to his employees.

Alternative C virtually embraces all hazards which the OSHA clause relegates to "undetectable" status. By substituting for Alternative A's reasonable diligence requirement a strict standard of care analogous to that in the products liability field<sup>80</sup>—*i.e.*, an absolute duty—Alternative C shifts the focus to whether the *inspector*, not the employer, can recognize a hazard or condition causing or likely to cause death or serious physical harm.

D. Each employer shall have an absolute, non-delegable duty to furnish to each of his employees employment and a place of employment which are free from hazards and conditions that are causing or *may cause* death or serious physical harm to his employees.

Alternative D substitutes "may" for "likely" as the probability element and thereby goes a step beyond C by covering many hazards too "improbably harmful" for OSHA purposes.

E. Each employer shall have an absolute, non-delegable duty to furnish to each of his employees employment and a place of employment which are free from hazards and conditions that are causing or *are likely to cause* death or *serious harm* to his employees.

Alternative E, built upon the structure of C, narrows the class of "harmless" hazards by bringing hazards causing or likely to cause serious non-

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<sup>79</sup> State courts have often accepted an employer's cost-benefit analysis argument—cost of avoidance v. cost of the accident—as an adequate defense to a negligence action based on an alleged safety violation. *See, e.g.*, *Helme v. Great Western Milling Co.*, 43 Cal. App. 416, 185 P. 510 (1919); *Jackson v. Cincinnati Gas & Co.*, 70 Ohio App. 139, 24 Ohio Op. 450; 42 N.E.2d 218 (1941). (The advent of workmen's compensation laws accounts for the age of most relevant cases.) Alternative C precludes the successful use of such an argument in defense of a general duty citation.

<sup>80</sup> *See generally* *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961), *cert. denied*, 382 U.S. 987 (1966); *Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697, 59 C.2d 57, 377 P.2d 897 (1963); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Thomas v. Winchester*, 6 N.Y. 397 (1852).

physical harm within the reach of the ad hoc protection offered by the plan.

F. Each employer shall have an absolute, non-delegable duty to furnish to each of his employees employment and a place of employment which are free from hazards and conditions that are causing or are likely to cause *harm* to his employees.

Alternative F follows the lead of E and completes the constriction of the category of "harmless" hazards.<sup>81</sup> It covers all hazards causing or likely to cause harm of any magnitude and ilk.

G. Each employer shall have an absolute, non-delegable duty to furnish to each of his employees employment and a place of employment which are free from hazards and conditions that are causing or *may cause* harm to his employees.

Alternative G, having F as its foundation, effectively takes in the remaining category of hazards not specifically enforceable under OSHA, "improbably harmful" hazards, by substituting "may" for "likely."

#### 1. Arbitrary Enforcement and Unfair Surprise

With regard to the problem of arbitrary enforcement, a demarcation of sorts in the spectrum emerges. Alternatives A-C require the inspector to establish that the alleged violation is causing or more likely than not will cause physical harm sufficiently serious to require more than first aid care. Although this burden of proof<sup>82</sup> may lend itself somewhat more to arbitrariness than that required to be carried under the OSHA clause,<sup>83</sup>

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<sup>81</sup> Whether or not the number of hazards first brought within reach of official sanctions by constricting the "improbably harmful" class of hazards (Alternative D) exceeds that number first citable as a result of delimiting the "harmless" category (Alternatives E and F) defies both logical and practical resolution. The state of knowledge as to what is productive of how much and what kind of harm is in constant flux. This, coupled with the incessant introduction into the workplace of new machines, substances and procedures of indeterminate effect on occupational safety and health, renders impossible a decision as to the specific enforcement potential of Alternative D as compared to that of Alternatives E and F. Ordering Alternative D before Alternatives E and F on the spectrum is therefore done rather arbitrarily.

<sup>82</sup> Under OSHA, the burden of proof in all contests (except those for modification of the abatement period) before the Review Commission rests with the Secretary of Labor, 37 Fed. Reg. 20242 (1972).

<sup>83</sup> Since the threat of arbitrary enforcement grows in proportion to the ease with which an inspector can justify his official actions, his decisions both to issue and not to issue citations should be subject to review. Although the federal Act provides for formal agency and judicial review of the former type of decisions, Act §§ 10, 11, 29 U.S.C. §§ 659, 660 (1970), it grants far less review of decisions not to issue a citation. Thus, where an inspector fails to issue a citation based on an employee complaint (made to a representative of the DOL before or during an inspection), the complainant is entitled only to informal review by the DOL of this decision, Act §§ 8(f) (1), (2), 29 U.S.C. §§ 657(f) (1), (2) (1970); 29 C.F.R. § 1903.12 (1972). (A similar right to informal review is one of the criteria of acceptability for state plans, 29 C.F.R. § 1902.4(c) (2) (iii) (1972).) He does not have the right to challenge the decision before the Review Commission. Indeed, an employee only has standing to argue to the Commission that the abatement period for an *already* cited violation is unreasonably long, Act § 10(c), 29 U.S.C. § 659(c) (1970).

it invites inconsistent enforcement to a far lesser extent than does the inspector's substantially reduced burden under Alternative D with its reduced probability requirement. As the probability element declines in magnitude, the prediction to be made becomes more speculative and increasingly a function of individual judgment. In this instance, since Alternative D requires proof only of some nexus between the alleged violation and serious physical harm, the decision as to when a citation should issue becomes highly subjective. One inspector might easily ignore what another would seize upon as a general duty violation. A failure to provide equal justice is practically assured since this inconsistent enforcement cannot be checked by agency or judicial review: The state enforcement agency's burden of proof is so easily carried that none but the most egregious of an inspector's aberrations would be caught.<sup>84</sup>

Alternatives E and F lend themselves to similar criticism because of their expansion of the categories of harm given general duty protection. In applying Alternative E, what criteria can be used to distinguish serious from nonserious emotional or psychological harm? Likely to cause serious nonphysical harm to whom—the reasonably stable employee or the specific employees in the workplace? In either case, will the inspector require psychiatric training to recognize general duty violations and will psychiatric testimony become a *sine qua non* to an adequate defense in many agency review proceedings? Alternative F calls upon inspectors to exercise their metaphysical faculties: What devices, procedures or substances in this factory are likely to inflict a minor cut, bruise, or burn upon an employee or harm him to any extent psychologically? Surely no two inspectors would tour a factory and compile the same list of general duty violations. Finally, Alternative G, with both reduced probability and expansive harm standards, would suffer even more severely from these infirmities in the process of enforcement.

Fair warning presents a less serious obstacle to enactment of a broad general duty clause. The federal Act, in its definition of a "serious violation,"<sup>85</sup> points the way to a reconciliation of an expansive general duty

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<sup>84</sup> Even assuming an employee right to contest non-issuance of citations, this problem would remain. First of all, an employee would have to take the initiative of bringing the alleged violation in his plant similar to that cited in plant X to the reviewing body's attention. Secondly, at the hearing in review of non-issuance, the state enforcement agency will have both the burden of proof and presumption of administrative expertise working in its favor.

This assumes a system in which the state has the burden of proof in enforcement proceedings against the contesting employer. Placement of the burden of proof on employees in non-issuance contests is the logically necessary corollary to this latter burden. If, however, these two burdens of proof were reversed, the employer would become even more vulnerable to the issuance of citations but his arbitrary enforcement worries might well be over. Under Alternatives D-G, employees armed with this favorable burden of proof would be virtually unstoppable in forcing the state to issue citations against their employers. The abundance of company in one's misery would, however, obviously not commend itself sufficiently to employers so as to enlist their support for this inversion of burdens of proof.

<sup>85</sup> According to Congress:

and initial penalties that will avoid unfair surprise.<sup>86</sup> Essentially, if an employer were subject to initial penalties only for a "serious violation" of the clause—a violation of which the employer knew or with the exercise of reasonable diligence could have known—the unfair surprise otherwise inherent in a general duty clause ostensibly demanding more than reasonable diligence would be substantially eliminated.<sup>87</sup> Indeed, the possibility of unfair surprise would be no greater than for the far narrower OSHA clause. Although the employer would still be subject to penalties for a failure to correct any cited hazard within the stated abatement period, prior notification would preclude any objections of unfair surprise to this latter type of penalties.

## 2. Costs and Benefits of the Alternatives

Although a particular state legislature's final analysis of the cost-benefit considerations related to a general duty clause depends in large measure on its individual set of priorities, isolating the components of the problem does serve to clarify the legislative judgment. The benefits attributable to a general duty clause, principally those accruing to employees from safer and healthier workplaces, are a function of three main variables: the specific enforcement potential of the clause, voluntary compliance generated by the clause, and broad judicial construction of the plan stimulated by the clause.

As to the first of these three, the general pattern is one of better ad hoc protection offered by each succeeding alternative; how much better from one alternative to the next is not, however, clear.<sup>88</sup> Although Alter-

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... a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Act § 17(k), 29 U.S.C. § 666(j) (1970).

<sup>86</sup> To require an employer to eliminate the innumerable candidates for initial penalties under Alternatives D-G would be to demand an impossible prescience. Moreover, penalties for violation of Alternative C may often be highly unfair since the employer can only avoid some such violations by investing enormous sums in research and sensitive detection equipment (and thereby raising his hazard-detection competence to the level of the inspector's).

<sup>87</sup> If a state were to establish special penalties for willful or repeated general duty violations (as done in OSHA section 17(a), *see* note 53 *supra*), it might find, depending upon which one of Alternatives A-G it adopted, that this unfairness simply becomes transferred to another part of the system. That is, since it is easier to prove that Alternatives C-G have merely been violated (a sufficient basis upon which to allege a willful or repeated violation if OSHA § 17(a) is duplicated) than that they have been *seriously* violated, inspectors might be encouraged to charge employers with willful or repeated violations. Mental state or repetition would still have to be proven to show a willful or repeated violation; but the inspector might often regard proving either of these elements as easier than proving a serious violation. Accordingly, to eliminate the possibility of innumerable initial penalties for alleged willful or repeated violations, the state plan could limit the issuance of citations for willful or repeated violations of the general duty clause to willful or repeated *serious* violations.

<sup>88</sup> Statistics itemizing the number of times that inspectors faced the four categories of

natives D-G appear to be more beneficial in this respect than Alternative C, they may in practice give rise to specific enforcement which is no more protective of an employee's safety and health than Alternative C. First of all, Alternative C's failure to afford protection against nonserious physical harm is hardly of consequence in light of the expansive definition given "serious physical harm."<sup>89</sup> Secondly, Alternative C does not cover non-physical harm, but this gap in coverage is also of dubious practical importance. Since professional expertise would seem essential to intelligent determination of what is causing or likely to cause emotional or psychological harm, inspectors offer little more than their own arbitrary judgment in this area.<sup>90</sup> Finally, although Alternative C lacks the broad probability standard of Alternatives E and G, this, too, would not seem to be a major failing. If there were even a fair probability that grave harm would result from the maintenance of a hazard, it would be rare that such a hazard would not be likely to cause "serious physical harm" as that term has been defined.

Even conceding, however, somewhat greater protection by Alternatives

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hazards beyond the scope of the OSHA clause and *also* not covered by specific standards would prove highly valuable to a legislature in evaluating the alternatives. Unfortunately, and not surprisingly, no such statistics are now available. A legislature is thus left to draw its conclusions about the relative protection afforded by the various alternatives from employer contests of citations and penalties. But litigation under the OSHA general duty clause provides little guidance for the legislative decision. Although the general duty clause was invoked frequently as a basis for citations in the first months under the Act (when specific standards had not yet taken effect), it has since been employed "sparingly" in initiating enforcement actions, BNA, 2 O.S.H.R. 265, 274 (No. 11) (Aug. 17, 1972) (remarks of Review Commission Chairman Moran). Official statements emphasize that the clause is to be used only for highly extraordinary circumstances. *See, e.g., id.* 921, 931 (No. 33) (Jan. 18, 1973) (remarks of Review Commission member Van Namee). Since inspectors seem to have gotten the "message," the few employer contests of citations and penalties based on the general duty clause shed little light on the frequency with which inspectors would employ the various alternatives to perform a task left undone by standardsetting.

Yet, although this scant litigation fails to facilitate selection among the alternatives, it at least appears to reaffirm the substantive inadequacy of the OSHA clause and the dire implications of an unduly narrow clause for occupational safety and health. Among the few contests of a general duty citation issued after standards went into effect are three which intimate the existence of a good many hazards beyond the scope of the OSHA clause and not covered by specific standards. These three, *Secretary of Labor v. Triangle Refineries, Inc.*, *Secretary of Labor v. Norman R. Bratcher Co.*, and *Secretary of Labor v. Puget Sound Power and Light Co.*, may be found, respectively, at BNA, 1 O.S.H.R.D. 3050 (1973) (examiner's decision) (receipt of shipment of gasoline for four hours without anyone present on premises not a "recognized hazard" because standard of knowledge in the industry did not indicate the need for supervision); *id.* 1152 (1973) (Review Commission decision) (employees' use of aluminum ladder near an electrical power line not "likely" to cause serious physical harm, though in fact did); BNA, 2 O.S.H.R. 353, 364 (No. 14) (Sept. 7, 1972) (examiner's decision) (deteriorated wire cable used to transport employees on cable car not a "recognized hazard" as deterioration not apparent or visible under inspection practices accepted in the industry).

<sup>89</sup> See note 85 *supra*.

<sup>90</sup> Citations would be issued on the basis of predicted nonphysical harm but the real villains would be likely to go unnoticed. Any real protection in this area of psychological or emotional harm would almost inevitably have to come from standard-setting: Deliberate consideration of a broad input of expert testimony and submissions appears to be a prerequisite to meaningful decisions on these difficult matters.



D-G than by Alternative C via specific enforcement, Alternative C may compensate for this deficiency with its greater promise of voluntary compliance. The deterrence generated by the language and nature of enforcement of Alternatives D-G<sup>91</sup> is seriously undermined by their far greater production of employer hostility than Alternative C. The "serious violation" limitation would ensure that initial penalties arouse no greater employer hostility under Alternatives D-G than under C or, for that matter, than under the OSHA clause.<sup>92</sup> However, as to the threat of arbitrary enforce-

<sup>91</sup> As an added deterrent force, a state might wish to extend the employer's general duty to his employees to frequenters of the place of employment as well, *i.e.*, to "every person, other than an employee, who may go in or be in a place of employment under circumstances which render him other than a trespasser," OHIO REV. CODE ANN. § 4101.01(E) (Page 1965). Statutory precedent in various states would support such an extension. *See, e.g., id.* § 4101.11; WIS. STAT. ANN. § 101.06 (1957). In codifying the employee's common law right to sue his employer for injuries suffered as a result of the latter's negligence, some states also made explicit the right of frequenters to do the same. (Although these provisions codifying employees' common law rights resemble general duty clauses—and were indeed assimilated to the like by Congress, S. REP. NO. 91-1282, *supra* note 6, at 5186—they typically are inoperative before-the-fact, provide no basis for citations or penalties and, with the advent of workmen's compensation laws, are only precatory in nature.) Extension of the general duty to frequenters serves a deterrent function by laying the groundwork for a penalty provision which would facilitate negligence actions by frequenters: It would allow frequenters injured as a result of a general duty violation to bring their tort action against the employer on a negligence *per se* theory.

Another possible deterrent—and one advocated by many proponents of occupational safety and health—is the creation of a right of action on the part of an employee injured as a result of his employer's violation of OSHA duties. *See* Statement of Richard Hobin, 1969-70 *Senate Hearings* 858-60; Statement of Ralph Nader, 1969-70 *Senate Hearings* 628; Remarks of Congressman James O'Hara, 1969 *House Hearings* 1206. In his testimony, Mr. Nader routed the general deterrence impact of such a right. It constituted, he said, a *sine qua non* to employers' coming out on the side of safety in a cost-benefit analysis of the advisability of instituting new safety devices and procedures. A state would, however, encounter serious obstacles if it were to decide to create this right of action in its plan. First of all, establishment of this right would necessitate amendment of existing workmen's compensation laws. (OSHA itself disclaims any impact on its part on state workmen's compensation laws, Act § 4(b)(4), 29 U.S.C. § 653(b)(4) (1970).) This becomes a major practical consideration in those states that have incorporated their workmen's compensation laws into their constitution. *See, e.g.,* OHIO CONST. art. II, § 35. Secondly, management can be counted on to mount a concerted opposition to any such move. This effective rehabilitation of the old negligence action plainly runs counter to the theory which at least partly informs the workmen's compensation laws—*i.e.*, that there will be a tradeoff of limitation of the award for certainty of recovery. Management would be loath to give employees the best of both worlds. In deciding whether or not to establish an employee right of action despite this certain resistance, a state can anticipate enhanced general deterrence. It must, however, also give serious consideration to the impact the institution of this right may have on employer hostility—the other component of voluntary compliance and one ignored only at great risk to the effectiveness of the plan. In addition, a state might simply regard the costs to the employer of such a provision as too high. Similar considerations would govern a state's decision whether or not to extend the general duty to frequenters.

<sup>92</sup> The question remains: Why be content to maintain hostility to initial penalties on the same level as the OSHA clause does? Why not eliminate initial penalties for general duty violations altogether? In terms of minimizing hostility, this would surely be logical. One cannot ignore, however, the very important interest in general deterrence. The consequent loss in protection of employee safety and health from such a move must be weighed against the unfairness of requiring an employer to eliminate hazards discoverable with the exercise of reasonable diligence. First of all, if there is no penalty for initial violations, employers are surely encouraged to maintain a general duty violation until specifically ordered to eliminate it. From the employer's standpoint, there would be little to lose and much to gain by maintaining

and hostility are not large and tend to cancel one another out, it would seem that there is little basis to distinguish between the voluntary compliance effects of the three alternatives. Any small advantage which Alternatives A and B may have over C in this respect would not, in any event, compensate for their failure to give ad hoc authority to proceed against grave dangers that an employer could not reasonably be expected to discover.<sup>94</sup> Finally, of the three alternatives, C would tend most to promote a judicial construction favorable to employees.

The costs of a general duty clause, the other side of the legislative balance, derive primarily from two interrelated components, each increasing in magnitude as the employer duty is expanded. An obvious cost component is the employer's expense in complying with his general duty (at least when specifically enforced), an expense absorbed by the employer and/or passed along to his customers. A secondary, and perhaps less obvious, cost is that accruing from arbitrary enforcement—specifically, disequilibrium of the economy by making cited businesses unable to compete with others allowed to continue to use practices and methods prohibited the latter, and thereby forcing their dissolution. It can be asserted with some confidence that Alternative C is comparatively more worth its costs than Alternatives D-G. These latter alternatives, which offer benefits not significantly greater—if indeed greater at all—than Alternative C, exact costs considerably higher: The employer's costs in complying with the broader general duty are greater, as are the costs growing out of more arbitrary enforcement. Enactment of any of Alternatives D-G would therefore seem to constitute a less profitable allocation of society's resources than enacting Alternative C. Since a legislature would also tend to disfavor Alternatives D-G on principle for their serious threat to equal justice, Alternative C would appear overall to constitute a more acceptable clause to a legislature, almost regardless of its priorities, than any of the latter.

Whether a legislature would regard Alternative C's benefits as justifying its costs or instead would choose a less expansive alternative remains, however, largely a matter of legislative priorities. Nevertheless, a general observation important in terms of the balance can still be made: Although Alternative C's costs would exceed those of Alternative A or B, the disparity in price is neither as great nor as significant as might appear. First of all, Alternative C, essentially no more conducive to arbitrary enforcement than Alternative A or B, should cost no more on that account. Additionally, flexibility in setting the abatement period and conditions of abatement provides a means to ensure that the higher costs of Alternative C do not fall inequitably.<sup>95</sup> Finally, flexibility in assessing penalties,<sup>96</sup> like

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<sup>94</sup> Cf. note 88 *supra*.

<sup>95</sup> For example, where the violative condition is without a known safe or healthful counterpart, it might be desirable to set a fairly short abatement period for a large employer on the assumption that he can and will invest sufficient funds to discover a safer or healthier

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<sup>94</sup> Cf. note 88 *supra*.

<sup>95</sup> For example, where the violative condition is without a known safe or healthful counterpart, it might be desirable to set a fairly short abatement period for a large employer on the assumption that he can and will invest sufficient funds to discover a safer or healthier

that in fixing the abatement period, permits mitigation of unduly harsh effects which might flow from a uniform method of dealing with violators of the broader clause. The particular circumstances of the violating employer—e.g., the size of his business, his good faith, and his history of violations under the plan (and, perhaps, other safety and health laws)—might easily be figured into this assessment of penalties.<sup>97</sup>

### III. A RECOMMENDATION

#### *Alternative C:*

Each employer shall have an absolute, non-delegable duty to furnish to each of his employees employment and a place of employment which are free from hazards and conditions that are causing or are likely to cause death or serious physical harm to his employees.

As used in this section:

- (1) "serious physical harm" means work-related injuries and illnesses other than those requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.
- (2) "likely to cause" means that the likelihood that a hazard or con-

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way of running his business. On the other hand, it might simply be beyond the short-term capacity of a small employer to try to develop safer or healthier methods. If so, a short abatement period would only put him out of business—to not only his but also his employees' detriment. Logically, then, the small employer may often be allowed a considerably longer period of time for abatement in full than the large employer and, in the interim, perhaps be required to take some lesser measures mitigating the potential danger posed by the hazard.

The DOL lists the following as considerations in setting the abatement period:

... the seriousness of violation, the number of exposed employees, the availability of needed equipment or personnel, the estimated time required for delivery and installation of needed equipment, and any other relevant circumstances.

BNA, O.S.H.R.R.F. 77:3507 (1971).

<sup>96</sup> Penalties would be assessed for a general duty violation only if the violation were "serious" (see note 85 *supra* and accompanying text) or if the employer failed to correct a cited violation, serious or nonserious, within the abatement period. It should be noted that even if citations for willful or repeated violations were not explicitly limited to serious willful or repeated violations (see note 87 *supra*) this would essentially be the practical result with these three general duty clauses. First of all, the required showing of a substantial probability of serious physical harm is common to both serious and nonserious violations of these alternatives. Secondly, the employer's ability to discover the violation with the exercise of reasonable diligence—the other part of a showing that there is a "serious violation"—is fundamental to both willful and repeated violations. As to willful violations, this should—given the mental element involved in proof of willfulness (see note 53 *supra*)—be obvious. As to repeated general duty violations, *id.*, a first nonserious violation would put the employer on notice against recurrence of *that very same violation* and thereby effectively preclude the contention that the violation was not discoverable by the employer with the exercise of reasonable diligence.

<sup>97</sup> The DOL instructs its representatives to calculate an "unadjusted penalty" (ranging from zero to the maximum penalty for the violation) based on the "gravity" of the violation. Then they are to adjust this penalty downward by up to 20 per cent for good faith, up to 10 per cent for business size (employers with few employees favored for these purposes), and up to 20 per cent for history of previous violations, BNA, O.S.H.R.R.F. 77:3701-2 (1971). (Originally, an unadjusted penalty was only calculated for nonserious violations; for serious violations, the unadjusted penalty was simply fixed at the maximum penalty. This failure to differentiate among serious violations in terms of gravity was, however, declared invalid by the Review Commission, *Secretary of Labor v. Nacirema Operating Co., et al.*, 1 O.S.H.R.D. 1001 (1973).

dition will cause an accident or illness and the likelihood that such accident or illness will cause harm of the nature proscribed together indicate that more likely than not said hazard or condition will cause harm of the nature proscribed.

Every state has indicated its intention to draft a state plan.<sup>98</sup> Whether a state has yet to submit its plan for federal approval or has already received such tentative approval,<sup>99</sup> it is hoped that this analysis will cause the state to reevaluate the significance of a general duty clause to its plan's success. The recommended general duty clause is put forward for adoption by the states as a serious effort to reconcile the competing interests involved. It promotes occupational safety and health at minimal expense to fundamental principles of equal justice and fair warning. In addition, although it strikes a cost-benefit balance not indisputably "right," a legislature impressed by the need for safety in the workplace will not deem its costs excessive for the benefits purchased. Admittedly, adoption of the proposed clause would not automatically assure a successful state plan. A dramatic reversal of the trend in almost every state of more occupational injuries and illnesses is not so easily achieved. Adoption of this recommendation would, however, constitute a major step toward reversing this unacceptable trend and assuring every employee in the state a safer and healthier place to work.

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<sup>98</sup> 49 states entered into 18(h) agreements with the OSHA Administration to establish their own safety and health plans, BNA, 1 O.S.H.R. 1017, 1024 (No. 48) (Mar. 30, 1972). On 18(h) agreements see note 25 *supra*. The remaining state, Ohio, has indicated that it also intends to draft a state plan, BNA, 1 O.S.H.R. 1041, 1062 (No. 49) (Apr. 6, 1972).

<sup>99</sup> South Carolina, Montana, Utah, North Dakota, New Jersey, Washington State, North Carolina and Oregon have already received approval of their plans, all of a "developmental" nature (see note 28 *supra*). A number of other plans have been submitted and are awaiting review, BNA, 2 O.S.H.R. 1177, 1205-6 (No. 41) (Mar. 15, 1973).

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